Wash. State Dep't of Licensing v. Cougar Den, Inc.: Taxation in Indian Country

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I. Introduction

Since time immemorial, the original, free, and independent Nations and peoples that now comprise the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") travelled extensively both within and beyond the Pacific Northwest to hunt, gather, build familial ties, and trade. On June 9, 1855, the Yakama Nation and the United States executed the Treaty with the Yakamas, which expressly reserved, in relevant part, the Yakama Nation's inherent sovereign right to continue travelling and trading outside the Yakama Reservation's boundaries free from encumbrance. Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951 [hereinafter Treaty]. The Yakama Reservation is now within Washington State.

Cougar Den, Inc. ("Cougar Den") is a Yakama Member-owned fuel distribution company licensed by the Yakama Nation. Cougar Den drives its trucks from the Yakama Reservation south along a traditional Yakama trading route through the Satus Mountains, traveling 27 miles through Washington State and across the Columbia River to Oregon, where it purchases fuel. The fuel is purchased for export to the Yakama Reservation—outside Oregon—so the fuel is not subject to Oregon fuel taxes. Cougar Den then transports the fuel back to the Yakama Reservation where the fuel is sold to Yakama Nation-owned and Yakama Member-owned fuel retailers for sale primarily to Yakama Members.

Under Washington State's fuel tax scheme, it imposes a tax on fuel "imported" into the State and requires a license for "importing" fuel, i.e., transporting fuel into Washington. In 2013, the Washington State Department of Licensing assessed $3.6 million in tax liability and penalties against Cougar Den for importing fuel into Washington State without paying State fuel taxes. Cougar Den appealed and two seperate Administrative Law Judges reversed the tax assessment, citing the Treaty-reserved right to travel. The Department of Licensing's Director reversed each ALJ. On appeal, the Yakima County Superior Court reversed the Director, again citing the Treaty-reserved right to travel. The Washington State Supreme Court affirmed the decision on direct review, holding that the State's "importation tax" places an impermissible condition on the exercise of a Treaty-protected

activity. Washington filed a petition for certiorari with the United States Supreme Court. The Court sought the advice of the Solicitor General on whether to grant the petition, and after receiving his recommendation, granted certiorari.

Mr. Adam Unikowski, Jenner & Block, argued on Cougar Den's behalf before the United States Supreme Court on October 30, 2018.

II. The Yakama Nation's Treaty Right to Travel

Article III, paragraph 1 of the Treaty states:

> And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; **as also the right, in common with citizens of the United States, to travel upon all public highways.**

Treaty, 12 Stat. 951 (emphasis added). At the Walla Walla Treaty Council Washington Territorial Governor Isaac Stevens explained this language to the Yakama Nation's ancestors, stating "[y]ou will be allowed to go on the roads to take your things to market, your horses and cattle." Record of the Official Proceedings at the Council in the Walla Walla Valley, United States Dep't of Interior (June 9, 1855). He promised that Yakamas would "have the same liberties outside the Reservation . . . to go on the roads to market." *Id.* Governor Stevens' promises were then affirmed by his emissary, General Joel Palmer, who stated "my Brother has stated that you will be permitted to travel the roads outside the Reservation." *Id.*

Federal courts have interpreted the Yakama Nation's Treaty Right to Travel as "guarantee[ing] the Yakamas the right to transport goods to market over public highways without payment of fees for that use." *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998) (holding that the Treaty Right to Travel exempts the Yakamas from paying Washington truck license and overweight permit fees); *see also, e.g., United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) (holding that the Treaty Right to Travel precluded the federal government from prosecuting Yakamas for not providing notice to the state before transporting tobacco for sale or trade).

III. Arguments in *Cougar Den, Inc.*: Possession versus Transportation

In recommending that the Supreme Court grant *certiorari*, the United States characterized the question presented as:

> Whether Article III [of the Treaty of June 9, 1855] precludes application to Yakama tribal members of a tax imposed by the State of Washington on fuel purchased out-of-state and imported into Washington, as part of a comprehensive state scheme that also imposes the tax on fuel removed from an in-state terminal or refinery.

United States Amicus Curiae Br., at I (May 15, 2018). The United States argued that the Right to Travel did not preclude the State's levy of fuel taxes against Cougar Den because the incidence of the tax was on the possession of fuel, not the transportation of fuel. *Id.* at 10. Therefore, the United States argued that the Washington Supreme Court erred in relying on *Cree* and *Smiskin*—a case the United States lost and expressly wants overturned—to conclude that the tax was a burden on Treaty-protected travel, rather than a burden wholly on trade. *See King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (2014) (allowing the State to require King Mountain to contribute to an escrow fund for each unit of tobacco sold because it did not implicate travel). *Id.* at 18-19.

The State of Washington argued that Yakamas are subject to nondiscriminatory taxes outside Indian Country unless a federal law (e.g., a Treaty) exempts Yakamas from the tax. Pet'r's Br. 16 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Chickasaw Nation v. United States*, 534 U.S. 84 (2001)). They claimed that Washington's fuel tax was only on the possession of fuel outside Indian Country, did not restrict the Yakama's right to travel, and therefore the Treaty did not provide the requisite exemption from the State fuel tax. *Id.* at 21-22. To demonstrate that its fuel tax was not on travel, the State argued that its fuel tax scheme taxed fuel regardless of how it came into possession in the State, and not only if it was transported on public highways. *Id.* at 17. The State also challenged the Washington Supreme Court's reliance on *Smiskin* instead of *King Mountain*, much as the United States argued. *Id.* at 32-33.

Cougar Den argued that the Treaty Right to Travel exempts Yakamas from any State taxes on the transportation of goods within the State, and the plain language of the State's fuel tax statute imposes an illegal tax on the importation (i.e. transportation) of fuel into the State. Resp't's Br. 40. Cougar Den relied on similarities between the Right to Travel and the Right to Fish precedent—both including off-reservation rights exercised "in common with" citizens of the territory—and *Cree*, to argue that the Right to Travel is an express exemption from off-reservation state taxation of the transportation of goods to market. *Id.* at 19. Cougar Den also points out that the United States Supreme Court is bound by the

Washington Supreme Court's interpretation of Washington's fuel tax statute as taxing the transportation of fuel, which is impermissible under the Treaty. *Id.* at 3.

At oral arguments, Justices Sotomayor, Kagan, Gorsuch, and Kavanaugh appeared supportive of Cougar Den. In her initial questions to the State, Justice Sotomayor stated "[s]o I'm not quite sure what permits you to tax them at all." Transcript at 6. Justice Kagan pressed the State on how it was distinguishing between possession and transportation of goods, asking how a pig farmer taking his pigs to market would describe his actions: taking the pigs to market, or possessing the pigs to market. Transcript at 19. Justice Gorsuch asked why, given the State's prior losses on Right to Travel cases, the State wasn't estopped from even arguing this case, and Justice Kavanaugh pointed out that the Yakama Nation ceded a land base larger than the State of Maryland to preserve the continued right to take its goods to market. Transcript at 13, 15.

Justices Roberts, Alito, and Breyer were more skeptical. Justice Roberts suggested that because the tax was assessed on a per gallon basis at the State border, it was a possession tax rather than a transportation tax. Transcript at 40. Justice Alito described Cougar Den's argument that possession and transportation of goods cannot be treated separately as "artificial," and Justice Breyer expressed deep concern that allowing untaxed transportation of goods could be abused to allow the transportation of marijuana free from state taxation. Transcript at 43, 45. It was difficult to determine Justices Ginsburg's and Thomas's initial thoughts on the case.

As of January 28, 2019, the Supreme Court has not yet issued its decision in *Cougar Den*.

IV. Potential Impacts to Indian Country

The substantive impact of this case on Indian Country should be limited. The Court's heavy focus during oral arguments on characterizing Washington's tax as either an impermissible tax on the transportation of goods to and from market, or a permissible tax on the possession of goods outside Indian Country, may signal that the decision will be limited to a construction of the specific Treaty right and specific taxing scheme at issue. This Treaty-reserved right to travel is only included in treaties with two other Nations: Nez Perce, and the Confederated Salish and Kootenai Tribes. Both of those Nations have fuel tax compacts with Idaho and Montana, respectively, which governs taxation of fuel delivered and sold on their lands. If anything, this case may further clarify the existing and extensive federal precedent for analyzing the applicability of state taxes to off-reservation conduct that is otherwise protected by Treaty.

V. Strategy for Future Cases: The Doctrine of Discovery

The Yakama Nation is often confronted with disputes like *Cougar Den*, where its inherent sovereign and Treaty-reserved rights are being threatened by the United States and

Washington, Oregon, Idaho, California, Montana, and Alaska. The Yakama Nation has a long track record of fighting and winning these disputes, but every new decision—whether favorable or unfavorable—places new limitations on its rights. For more than a century, these limitations have systematically whittled away the rights reserved by the Yakama Nation's ancestors in the Treaty with the Yakamas. At some point, there won't be any rights left for federal courts to diminish. To fight for the full recognition of the Yakama Nation's inherent sovereign and Treaty-reserved rights in the face of this termination system, the Yakama Nation is bringing legal awareness to the modern day impacts of the doctrine of discovery. *See* Yakama Nation Amicus Curiae Brief (Sept. 24, 2018).

The doctrine of discovery is the legal fiction that by 'discovering' the Americas, Christian Europeans automatically acquired legally recognized property rights in all Native lands. *Johnson v. M'Intosh*, 21 U.S. 543, 572 (1823). In the Marshall trilogy, Justice John Marshall injected this fictitious doctrine into federal law from the Roman Catholic Church, who in the 15th century issued a series of papal decrees directing the subjugation of Native Nations and Peoples in the Americas based on the doctrine of discovery. Future Supreme Courts then relied on this false religious doctrine for the foundational—and extremely detrimental—canons of federal Indian law.

In *United States v. Kagama*, 118 U.S. 375 (1886), and *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-566 (1903), the Court announced Congress' extra-constitutional plenary power over all Indian affairs—the plenary power doctrine—which it justified by pointing to Native Nations' loss of sovereign, diplomatic, economic, and property rights upon first 'discovery' by Europeans. In *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870), the Court applied the doctrine of discovery and held that Congress can unilaterally abrogate Treaty rights with subsequent legislation unless there is an express exemption provided in the Treaty—the last-in-time doctrine. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978), the Court deprived Native Nations of criminal jurisdiction over non-members based on the statement in *M'Intosh* that Native Nations' rights "to complete sovereignty, as independent nations, were necessarily diminished" by European 'discovery'—the diminished tribal sovereignty doctrine.

When you receive the next opposition brief challenging your Client's sovereign rights, I urge you to trace the case citations used against you to their roots. Systematically track each legal principle from case to case until you reach its origin. More often than not, you will find yourself reading the aforementioned foundational federal Indian law cases, which are directly rooted in the false religious doctrine of discovery. By attacking these foundational cases and their reliance on the doctrine of discovery, we may be able to start undermining the more harmful federal Indian law cases that are wielded against Native Nations today.